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In The

Supreme Court of the United States

October Term, 1997

WILLIAM J. CLINTON, *et al.*,

Appellants,

vs.

CITY OF NEW YORK, *et al.*,

Appellees.

ROBERT E. RUBIN,

Appellant,

vs.

SNAKE RIVER POTATO GROWERS, INC., *et al.*,

Appellees.

On Appeal from the United States District Court for the District of Columbia

BRIEF FOR APPELLEES CITY OF NEW YORK, *et al.*

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RULE 29.6 STATEMENT

There are no changes to the Rule 29.6 Statement in Appellees' Memorandum in Response to Jurisdictional Statement.

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JURISDICTION

The district court had jurisdiction under 2 U.S.C. § 692(a) (Supp. II 1996) and 28 U.S.C. § 1331. The opinion and order of the district court were entered on February 12, 1998. J.S. App. 1a-33a. A notice of appeal was filed on February 13, 1998. J.S. App. 34a-35a. This Court noted jurisdiction on February 27, 1998. This Court has jurisdiction under 2 U.S.C. § 692(b) (Supp. II 1996).

STATEMENT

1. These consolidated cases bring the question of the constitutionality of the Line Item Veto Act before this Court for a second time. Last Term the Court reviewed a decision upholding a facial constitutional challenge to the Act, *Byrd v. Raines*, 956 F. Supp. 25 (D.D.C. 1997), but the Court did not reach the issue because the plaintiffs in that case — current and former Members of the Senate and House of Representatives — were held to lack standing. *Raines v. Byrd*, 117 S. Ct. 2312 (1997). Appellees in this case challenge a specific exercise of the President's power under the Act to "cancel" certain duly enacted federal laws. Specifically, Appellees contend that the President's cancellation of section 4722(c) of the Balanced Budget Act violated Article I of the Constitution and principles of separation of powers.

2. The relevant features of the Line Item Veto Act are accurately and thoroughly described in this Court's decision in *Raines*, 117 S. Ct. at 2315-16, as well as in the briefs filed by Appellants, Br. for Applts. at 5-7, and by Appellees in the companion *Snake River* case at 3-5. We will not unnecessarily repeat those discussions here.

3a. The medical assistance program ("Medicaid") authorized by Title XIX of the Social Security Act is the major vehicle by which the federal government furnishes financial aid to help states and localities provide medical care to the indigent, paying each state between 50 and 83 percent of its covered medical expenses. *See generally* 42 U.S.C.A. § 1396d(b) (Supp. Pamph. 1998).

In 1991 Congress passed legislation requiring that federal matching funds, called Federal Financial Participation ("FFP"), be

reduced by an amount equal to the federal share of money that states collect from taxes on health care providers, unless those taxes meet certain criteria. Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991, Pub. L. No. 102-234, § 2(a), 105 Stat. 1793, 1793 (codified as amended at 42 U.S.C.A. § 1396b(w) (Supp. Pamph. 1998)). Among other requirements in the 1991 statute, a provider tax must be "broad-based, in that it applies to all providers within a permissible class of items or services." J.A. 37; *see* 42 U.S.C.A. § 1396b(w)(3)(B) (Supp. Pamph. 1998). Additionally, it must be uniform. *See id.* § 1396b(w)(3)(B)(iii). These requirements can be waived by the Department of Health and Human Services ("HHS") if it concludes that a tax meets other statutory criteria. *See* 42 U.S.C. § 1396b(w)(3)(E).

In December 1994, HHS sent New York State a letter listing fifteen taxes that HHS said "do not meet the broad based and/or uniformity requirements" of Federal law. J.A. 56.[1] HHS advised New York to submit a waiver application within thirty days. J.A. 51. An accompanying "Fact Sheet" said that these fifteen taxes placed $955 million of FFP in jeopardy through June 30, 1994. J.A. 59, 62.

In the ensuing years, New York "submitted more than 1200 pages of waiver requests representing over 60 separate submissions for more than 20 different tax programs," but HHS never formally acted on these applications. J.A. 104. At the time of the President's veto, New York estimated potential FFP losses at $2.6 billion. J.A. 105-06. Under New York law, if HHS finds that the provider taxes listed in its October 1994 letter do not qualify for FFP, providers would be automatically liable retroactively for payment of additional taxes, which the New York State Commissioner of Health is directed to collect with interest and penalties if payment is not made within ninety days. J.A. 27-28, 45.[2]

1. Throughout this brief, references to "New York" will mean the State. Appellee New York City will be referred to as such.

2. *See, e.g.*, N.Y. Pub. Health Law §§ 2807-c(18)(e) (increased (Cont'd)

Appellee New York City Health and Hospitals Corporation ("NYCHHC") operates a large municipal hospital system that is the major provider of medical care to indigent patients in New York City. J.A. 42-43. Approximately 60 percent of NYCHHC's patient care-days are furnished to Medicaid recipients, J.A. 42, and loss of FFP for just one of the impermissible provider taxes would cost NYCHHC an estimated $4 million per year for the years 1993-96. J.A. 27-29, 45. Appellee Jamaica Hospital, a private hospital with 40 percent of its patient care-days in 1995 attributable to medicaid patients, J.A. 43, would lose $10 million for the years 1993-96 from liability on just two of the provider taxes HHS says are unlawful. J.A. 27-29, 45.

Appellee Greater New York Hospital Association ("GNYHA") includes NYCHHC and Jamaica Hospital as members, along with many other hospitals and nursing homes that would experience financial losses akin to those of the Appellee hospitals if HHS reduces New York's FFP. J.A. 29.

Appellee City of New York is a local social services district in the State of New York. *See* N.Y. Soc. Serv. Law § 56. Federal Medicaid legislation allows states participating in the Medicaid program to share with localities those expenses that are not reimbursed by the federal government. 42 U.S.C. § 1396a(a)(2). New York State does so, sharing most unreimbursed expenses equally with local social services districts. *See generally* N.Y. Soc. Serv. Law § 368-a(1)(d). The New York State Department of Health, the state agency that administers Medicaid in New York,

(Cont'd)
retroactive assessments for statewide hospital charity care pool on certain hospital revenues and hospitals); 2807-c(21)(g) (retroactive disallowance of certain charity care distributions); 2807-d(12) (gross receipts tax applied retroactively to excluded revenues, nursing homes, and hospitals); 2807-j(11) (charity care surcharge applied retroactively to Medicare and other hospital revenues); 2807-s(8) (professional education pool tax retroactively applied to excluded hospital revenues); 2807-j(12), 2807-k(15); 2807-l(3); 2807-s(9) (specifying hospital revenues that would be retroactively assessed).

see N.Y. Soc. Serv. Law § 363-a(1), has said that any reduction of FFP by HHS would, pursuant to state law, "be shared between the state, the localities and health care providers, all of whom will experience losses." J.A. 107.

b. In the Balanced Budget Act of 1997, Congress prevented HHS from reducing FFP for New York by declaring that those "taxes, fees, or assessments" collected from health care providers before June 1, 1997, for which New York had sought or would need to seek a waiver from HHS, "are deemed to be permissible health care related taxes and in compliance with" Medicaid requirements. Balanced Budget Act of 1997, Pub. L. No. 105-33, § 4722(c), 1997 U.S.C.C.A.N. [111 Stat.] 251, 515; J.S. App. 72a. The President signed the Balanced Budget Act into law on August 5, 1997, and the pending waiver applications were, in effect, approved statutorily.

4. On August 11, 1997, the President cancelled section 4722(c), relying on the Line Item Veto Act, 2 U.S.C. § 691 (Supp. II 1996), for his authority. J.S. App. 61a-65a. The President labeled section 4722(c) as "new direct spending," J.S. App. 63a, which is defined as "any specific provision of law that is estimated to result in an increase in budget authority or outlays for direct spending." 2 U.S.C. § 691e(8) (Supp. II 1996). The President's cancellation message said New York was "relying upon impermissible provider taxes to finance its Medicaid program." J.S. App. 64a. As required by the Line Item Veto Act, 2 U.S.C. § 691(a)(A)(i) (Supp. II 1996), the President certified that his cancellation "will reduce the Federal budget deficit." J.S. App. 63a. Federal savings were estimated at $200 million in FY 1998. J.S. App. 65a.

At a White House press briefing later that day, Appellant Raines, Director of the Office of Management and Budget (OMB), said that section 4722(c) gave New York relief for provider taxes "that had been determined by HHS to be illegal under a 1991 statute." J.A. 68. Returning to the subject later, Mr. Raines said "[e]veryone knows that we found these [New York provider taxes] to be unlawful." J.A. 73. He said that the cancellation would save the Federal government an estimated $200 million, J.A. 72, and

declared that it would be "bad policy" to allow New York to receive FFP from those taxes. J.A. 82.

In October 1997, HHS wrote to all state Medicaid directors informing them of a clarification of its regulation regarding whether a provider tax is uniform and reiterating that it would "continue to apply the current provider tax laws." J.A. 92.[3] The letter indicated a willingness "to work with States to resolve impermissible tax liabilities," J.A. 92, which, in HHS's view, could best be done with new legislation. J.A. 92-93.

As HHS has pointed out, it has not yet withdrawn FFP and has not issued a formal ruling on New York's waiver applications. J.A. 39. However, in its October 1997 letter, HHS said, absent adoption of new laws by August 1998, it "will move forward to complete the process already begun to apply with full force the current law." J.A. 93.

5. Appellees commenced this action in October 1997, seeking a declaration that the Line Item Veto Act is unconstitutional and that section 4722(c) remains a valid law. J.A. 31. The district court's jurisdiction was invoked based on its general jurisdiction over federal questions, 28 U.S.C. § 1331, and the Line Item Veto Act's expedited review provisions, 2 U.S.C. § 692(a)(1). J.A. 12. This action was consolidated "for all purposes" with *Snake River Potato Growers, Inc. v. Rubin*, which challenges the President's cancellation of another duly enacted law. J.A. 2, 7.

Appellants moved to dismiss for lack of subject matter jurisdiction, J.A. 3, asserting that Appellees lack standing to bring this action, and all parties moved for summary judgment on the merits. J.A. 3-4. Appellees were granted summary judgment, and the Line Item Veto Act was declared unconstitutional. J.S. App. 32a.

The district court found that Appellees had standing to sue because they "suffered an immediate, concrete injury the moment

3. According to Appellee GNYHA, the clarification reduces New York's "$2.6 billion FFP liability by about $700 million." J.A. 47.

that the President used the Line Item Veto to cancel section 4722(c) and deprived them of the benefits of that law." J.S. App. 13a. Focusing solely on the standing of the health care providers, *id.* at 13a n.8, the court said that section 4722(c) "exonerated" these providers of "their burden" to pay additional sums to New York if FFP were reduced. *Id.* The court said:

> When the President cancelled section 4722(c), [Appellees] were divested of the benefit conferred upon them by the legislation. In the simplest terms, [Appellees] had a benefit, and the President took that benefit away. That is injury.

Id. at 13a.

The district court rejected Appellants' argument that the potential for receipt of waivers from HHS deprived Appellees of standing, explaining that Appellees had two available methods of obtaining relief, one being through legislation, *id.* at 13a-14a, an avenue where Appellees achieved "complete success." *Id.* at 14a. Injury occurred when that result was "obliterated" by the President's action. *Id.*

The district court also found it "reasonabl[y] certain[ ]" that Appellees "will be liable for millions of dollars now that section 4722(c) has been canceled," citing HHS's October 1997 letter, the President's certification that his cancellation of section 4722(c) would reduce federal expenditures, and Appellant Raines' remarks to the press as showing "that it is more likely than not," *id.* at 15a, that New York would lose FFP, triggering payments from the Appellee providers to comply with the "automatic liabilities" imposed by New York law. *Id.* at 14a-15a.

On the merits, the district court held that the Line Item Veto Act violated both the procedural requirements of Article I, Section 7 of the Constitution and the doctrine of separation of powers. Noting that "[u]nilateral action by any single participant in the law-making process is precisely what the Bicameralism and Presentment Clauses were designed to prevent," J.S. App. at 25a, the district court held that

> when the President canceled [section 4722(c)] pursuant to his Line Item Veto authority, he unilaterally repealed duly enacted provisions and amended duly enacted laws, which Article I does not permit him to do.

Id. at 26a. The district court also found that Congress openly designed the Act to evade "Article I's requirement that the president sign or return bills *in toto*." *Id.* Given that the Constitution would prohibit Congress from conferring on the President a true line item veto power, the district court held that Congress' attempt to accomplish indirectly the same thing through the Act was also unconstitutional.

Finally, the district court held that the Act, by "authoriz[ing] the President to permanently extinguish laws," unconstitutionally conferred lawmaking power on the President. *Id.* at 30a.

> The Line Item Veto Act impermissibly crosses the line between acceptable delegations of rulemaking authority and unauthorized surrender to the President of an inherently legislative function, namely, the authority to permanently shape laws and package legislation.

Id. at 29a. Accordingly, the district court concluded that the Act violates the separation of powers.

SUMMARY OF ARGUMENT

1. This Court's jurisdiction has been properly invoked. Congress included special judicial review provisions in the Line Item Veto Act to assure that this Court would make a speedy definitive ruling on the Act's constitutionality. Congress' authorization of expedited review for suits brought by "any individual," rather than "any person," was not intended to limit expedited review only to suits brought by natural persons.

Appellees also have standing to sue. Since health care providers face massive financial liability if HHS withdraws FFP from New York because of the state's provider taxes, they are injured for purposes of Article III by the President's unconstitutional cancellation of a legislative provision declaring the taxes proper

and preventing HHS from withdrawing that FFP. This injury arises from the loss of a concrete legal protection that resolved an ongoing dispute in Appellees' favor and took the decision out of HHS's hands. It does not depend on the probability of HHS ultimately reducing New York's Medicaid funding.

Injury is also shown by the realistic danger that, without section 4722(c), HHS will withdraw FFP from New York. HHS has already said that the provider taxes violate Medicaid requirements, and the President called them "impermissible" when he cancelled section 4722(c). Though Appellants maintain that HHS might grant a waiver that would eliminate the risk of injury to Appellees, Appellants' own statements make it apparent that this is not likely. When the President cancelled section 4722(c), he certified, as required by the Line Item Veto Act, that his action would reduce the federal budget deficit. This certification necessarily implies that HHS will not use waivers to authorize expenditure of the money the President said he was saving by cancelling section 4722(c). Post-cancellation statements from the President's Budget Director also make it plain that the waivers will be denied.

Appellees' injury is fairly traceable to the cancellation of section 4722(c) even though Appellees' financial liability if FFP is withdrawn is imposed by state law. The injury facing Appellees is not a conjectural consequence that depends on speculative future conduct, but one that befalls them automatically by operation of law. Under this Court's precedents, the inevitability of this consequence and the fact that the cancellation of section 4722(c) is a "but for" cause of the injury creates a sufficient nexus between the injury and the challenged action to satisfy standing requirements. Of course, the injury will be redressed by a judgment favorable to Appellees.

2. The Line Item Veto Act confers upon the President unilateral power to "cancel" duly enacted spending and tax provisions within five days after their enactment. Cancellation of a spending or tax provision *extinguishes* the law itself; it can be restored to the status of federal law only if it is reenacted by Congress in accordance with the requirements of Article I of the Constitution. And in

exercising his cancellation power under the Act, the President is guided by no standard other than whether he favors the law at issue. The Act constrains *when* he may exercise his cancellation power, but it does not constrain *why* he may exercise it. The Act thus confers upon the President a discretionary power to repeal federal law. It is therefore unconstitutional, for the repeal of a federal law, no less than its enactment, must comply with Article I's "single, finely wrought and exhaustively considered procedure," specifically, bicameral passage and presentment to the President. *INS v. Chadha*, 462 U.S. 919, 951 (1983). The President's cancellation of section 4722(c) of the Balanced Budget Act is accordingly void.

At the center of Appellants' constitutional defense of the Act are this Court's decisions in cases, such as *Field v. Clark*, 143 U.S. 649 (1892), upholding statutory provisions granting the President authority to declare certain tariff acts and similar measures "repealed" and "inoperative." But these cases, as the district court below correctly concluded, merely uphold the congressional practice of "legislating in the contingency," where Congress exercises its Article I power to prescribe the conditions under which a law will cease to exist or be operative, and the President exercises his Article II powers to determine whether the prescribed conditions are satisfied and to implement the will of Congress accordingly. In cancelling a spending or tax provision under the Act, however, the President exercises his own will, not Congress'.

Nor can the President's discretionary power to cancel a spending provision be legitimately likened to his discretionary authority not to spend certain federal funds under a so-called "lump sum" appropriation measure. An exercise of spending discretion does not disturb, let alone extinguish, the underlying appropriation law. The President (or his successor) retains discretion to reverse a prior decision until the appropriation law expires, or is repealed in accord with Article I. The President's cancellation discretion, in contrast, operates directly on the law authorizing the spending, extinguishing it permanently. And while this Court's cases make clear that Congress may delegate to the President sweeping discretionary authority to *implement* federal law, particularly

spending statutes, Congress may not delegate any discretionary authority to extinguish it.

ARGUMENT

I. THIS CASE IS JUSTICIABLE.

A. This Court Has Jurisdiction Over Appellants' Appeal.

In their opening brief on the merits, Appellants argue for the first time in this litigation that the judicial review provisions of the Line Item Veto Act, 2 U.S.C. § 692 (Supp. II 1996), do not apply here because section 692(a)(1) authorizes suits by "individuals," and Appellees are not natural persons. Br. for Applts. at 16-17 & n.5. The argument is flawed in two respects. First, use of the term "individuals" in section 692 was not intended to limit its application only to suits by natural persons. Second, even if section 692 does not apply here, the suit should not be dismissed since it is within the district court's federal question jurisdiction even without resort to the expedited review procedures in the Line Item Veto Act. Only Appellants' appeal to this Court would be improper.

Section 692 was enacted to insure a speedy resolution of the Line Item Veto Act's constitutionality. Its intent should not be undercut by a crabbed reading of the word "individual." *See* 141 Cong. Rec. S4244 (Mar. 21, 1995) (statement of Sen. Simon) ("[w]hat we do not want is to live in limbo. . . . [W]e ought to know as quickly as possible whether it is constitutional"); *accord id.* (statement of Sen. Exon). As initially passed, expedited judicial review was allowed only for suits by Members of Congress. This led to a colloquy two days later between Senators Simon and McCain about amending the bill in conference to allow review by "any person." *Id.* S4476 (Mar. 23, 1995) (statement of Sen. Simon). Their fear was that a member of Congress might not have standing to seek review, thus defeating "[t]he intent of that amendment [which] was to provide a speedy way of removing any cloud" over the enactment. *Id.* To achieve that objective, the standing provision was expanded to permit suits by "individuals." As Appellants note, there is no explanation why the language

ultimately adopted allows review by "any individual," not any "person." Br. for Applts. at 17 n.5.

Given the stated purpose of section 692 and the absence of any evidence that this purpose changed as the amendment proceeded through Congress, Appellants' effort to read great significance into the use of the word "individual" should be rejected. Appellants are correct that the word "individual" ordinarily connotes human beings, not corporations, Br. for Applts. at 17, but that is equally true of the word "person." *See Webster's Third New International Dictionary* 1686 (1986) ("an individual human being"). Just as "person" has been used in legal usage to cover corporate entities and associations, the word "individual" has been similarly construed to implement legislative intent. *See, e.g., National Accounting Co. v. Dorman*, 11 F. Supp. 872, 873 (E.D. Ky.) (three-judge court), *aff'd per curiam*, 295 U.S. 718 (1935); *Rodriguez v. Banco Cent.*, 777 F. Supp. 1043, 1053-54 (D.P.R. 1991), *aff'd on other grounds*, 990 F.2d 7 (1st Cir. 1993). Congress' purpose was to ensure that the constitutionality of this legislation would be authoritatively determined by this Court as quickly as possible, and reading section 692 as allowing expedited review only for suits brought by natural persons would frustrate this purpose.

In any event, there is a natural person among the plaintiffs in the *Snake River Potato Growers* case, and since these two proceedings were consolidated by the district court "for all purposes," J.A. 2, they should be treated as one action. Section 692(b) vests this Court with jurisdiction to review "any order of [the district court] . . . issued pursuant to an action brought under [section 692(a)(1)]." The district court entered a single order granting summary judgment for all plaintiffs in the consolidated case. Mr. Cranney's standing should support this Court's jurisdiction over the entire proceeding. *See Steel Co. v. Citizens for a Better Env't*, 118 S. Ct. 1003, 1014 (1998); *United States Dep't of Labor v. Triplett*, 494 U.S. 715, 719 (1990).

If this Court were to find that section 692 does not apply to this case, it does not follow that the case should be dismissed. To

the contrary, section 692 provides a procedure for expedited judicial review, not the exclusive method for obtaining review. Quite apart from section 692, this case was also brought in the district court as one "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Nothing in the legislative history suggests that, when Congress enacted section 692, it foreclosed federal jurisdiction of any suit except one brought by members of Congress or natural persons. If section 692 is inapplicable, therefore, the only consequence is that Appellants' appeal to this Court is defeated.

We understand that Appellants have noticed an appeal to the Court of Appeals for the District of Columbia Circuit. It is manifestly senseless, however, for this case to be delayed in its journey to this Court. Accordingly, if Appellants do not promptly file a petition under 28 U.S.C. § 1254 and Rule 11 of this Court's rules for a writ of *certiorari* before judgment, Appellees will. *See* Robert L. Stern, Eugene Gressman, *et al.*, *Supreme Court Practice* 199 (7th ed. 1993) ("The Court has also reviewed cases before judgment below when a similar or identical question of constitutional or other importance was before the Court in another case and where the same case was argued on the merits in connection with a direct appeal from a district court that the Court found to have been erroneously taken.") (footnotes omitted).

B. Appellees Have Standing to Challenge the President's Cancellation of Section 4722(c).

The basic requirements for standing to sue in the federal courts are well-established:

> The "irreducible constitutional minimum of standing" contains three requirements. First and foremost, there must be alleged (and ultimately proven) an "injury in fact" — a harm suffered by the plaintiff that is "concrete" and "actual or imminent, not 'conjectural or hypothetical.' " Second, there must be causation — a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant. And third, there must be redressability — a likelihood that the requested relief will redress the alleged injury. This triad . . . comprises the core of Article III's case-or-controversy requirement. . . .

Steel Co., 118 S. Ct. at 1016-17 (citations and footnote omitted).

1. Appellees Have Suffered Injury in Fact.

The function of the injury-in-fact requirement is to make sure that the plaintiff has

> "alleged such a personal stake in the outcome of the controversy" as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.

Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). It

> assure[s] that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appraisal of the consequences of judicial action.

Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 466, 472 (1982); *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (" 'Injury in fact' . . . serves to distinguish a person with a direct stake in the outcome of a litigation — even though small — from a person with a mere interest in the problem.")

Appellees filed this suit to protect a concrete benefit that was provided by Congress and stripped away by the President when he cancelled section 4722(c). Without more, this deprivation of a legislative benefit — favorable resolution of the provider tax issue without further need to pursue HHS waivers — constituted injury

in fact. The cancellation of what in essence was a "Congressional waiver" injured Appellees by restoring the status quo and reinstating the potential, large or small, of HHS disapproval that existed prior to section 4722(c).

If it is necessary to reach the point, Appellees show below that it is highly probable — indeed, virtually certain — that HHS will not grant the waivers sought. When the President cancelled section 4722(c), his message to Congress called New York's provider taxes "impermissible," and he certified that the federal budget deficit would be reduced an estimated $200 million by his action. J.S. App. 64a. Appellees' realistic danger of future injury is also sufficient to establish standing.[4]

a. Deprivation of the Protection of Section 4722(c) Is Injury Regardless of the Likelihood that HHS Will Withdraw FFP.

Congress resolved an ongoing dispute about New York's provider taxes by enacting section 4722(c). Appellants do not

4. Discussions of Appellees' standing have focused on Appellees NYCHHC and Jamaica Hospital, *see* Dist. Ct. opinion, J.S. App. at 13a n.8; Br. for Applts. at 20 n.6, each of which stands to lose millions of dollars by operation of state law if FFP is withdrawn from New York (*supra* pp. 2-3 and n.2). These providers are just the tip of the iceberg. Appellee GNYHA represents the two appellee-hospitals plus over 170 other providers who will suffer losses. J.A. 28-29. Accordingly, it has standing to press its members' interests. *See Warth*, 422 U.S. at 511. A finding of standing for any single party assures the courts' jurisdiction to reach the merits and eliminates the need to pursue the issue further. *See Triplett*, 494 U.S. at 719. Appellee New York City also has standing because, by operation of state law, it shares with New York State the cost of most Medicaid expenses that are not reimbursed by the federal government, *see* N.Y. Soc. Serv. Law § 368-a(1)(d), and will suffer financial losses if FFP is reduced (*supra* pp. 3-4). Finally, the appellee-unions, representing many workers employed by health care providers, alleged sufficient injury to support their standing because of the job losses that would be likely to accompany imposition of substantial financial penalties on the providers. J.A. 29-30.

dispute that, when the President signed the Balanced Budget Act of 1997, section 4722(c) became law. At that moment, HHS's views regarding New York's provider taxes and HHS's intentions concerning issuance of waivers pursuant to the 1991 Medicaid laws became irrelevant. Congress decided, notwithstanding its prior enactments, that New York's provider taxes could not be the basis for reducing FFP. The President's cancellation of that pre-emptive resolution of the issue was injury, no matter what the likelihood that HHS might ultimately grant New York waivers. As the district court said:

> When the President canceled section 4722(c), [Appellees] were divested of the benefit conferred upon them by the legislation. In the simplest terms, [Appellees] had a benefit, and the President took that benefit away. That is injury.

J.S. App. at 13a.

Even before this Court "greatly expanded the types of 'personal stake[s]' which are capable of conferring standing," *Linda R.S. v. Richard D.*, 410 U.S. 614, 616-17 (1973) (brackets in original), interests protectible in court included those arising from "a statute which confers a privilege." *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137-38 (1939). "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S.*, 410 U.S. at 617 n.3; *Warth*, 422 U.S. at 500. When such an injury is "concrete and particularized," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), *i.e.*, it "affect[s] the plaintiff in a personal and individual way," it constitutes injury in fact. *Id.* at 560 n.1.

Appellants miss the mark when they argue that cancellation of section 4722(c)'s protection of New York's FFP is not injury because Appellees might achieve the same result if HHS decides to grant waivers. Br. for Applts. at 25-26. Standing is not determined solely by focusing on whether there is injury to a plaintiff's final litigation objectives, but on "the specific common-law, statutory or constitutional claims that a party presents." *International Primate*

Protection League v. Administrators of Tulane Educ. Fund, 500 U.S. 72, 77 (1991). In *International Primate*, plaintiffs were found by the court of appeals to lack standing to obtain their ultimate relief — protection of certain monkeys — but this Court nonetheless held that they had standing to challenge the case's removal to federal court because "they have lost their right to sue in the . . . forum of their choice," and that loss constituted injury. *Id.*

In *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), the plaintiffs challenged as unconstitutional a statute requiring that claims be resolved by binding arbitration, not in a court. This Court did not require the plaintiffs to go through the arbitration to ascertain if the result would injure them financially. It held that "it is sufficient for purposes of a claim under Article III that the claimant demonstrate it has been or inevitably will be subjected to an exercise of unconstitutional jurisdiction." 473 U.S. at 580. The "Article III injury is not a function of [how the arbitrator will rule] but of the tribunal's authority to adjudicate the dispute." *Id.*; *see also Withrow v. Larkin*, 421 U.S. 35 (1975) (addressing on merits physician's claim that impending administrative hearing would deny doctor procedural due process).

Here, HHS's authority over the provider tax issue is dependent on the validity of the President's cancellation of section 4722(c). If Appellees are correct that the cancellation was unconstitutional, HHS has no waiver decisions to make, and Appellees would be injured by HHS's wrongful exercise of authority over an issue resolved by Congress.

The injury in this case is far more concrete and palpable than those found sufficient to support standing in *International Primate* and *Thomas*. Appellees have lost far more than the right to have their dispute resolved in a particular forum. It was resolved. Section 4722(c) gave Appellees precisely what they ultimately wanted: protection from the liability they would incur if New York's FFP is reduced because of the provider taxes. The fact that the same result is theoretically achievable through HHS's processes does not alter the fact that Appellees suffered injury in fact when their existing legal protection was removed. *Cf. Sierra Club v. EPA*,

129 F.3d 137, 139 (D.C. Cir. 1997) ("[e]ven if alternative protective measures might limit the harm caused by the relaxation of regulatory provisions, the existence of alternative 'protective conditions' does not negate a party's standing to enforce statutorily mandated regulations").[5]

It has long been established that

> a plaintiff suffers a constitutionally cognizable injury by the loss of an opportunity to pursue a benefit . . . even though the plaintiff may not be able to show that it was certain to receive that benefit had it been accorded the lost opportunity.

CC Distribs., Inc. v. United States, 883 F.2d 146, 150 (D.C. Cir. 1989) (emphases omitted); *see Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211 (1995); *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 280-81 n.14 (1978). Here, Appellees actually lost their benefit, and they lost it as a direct result of the presidential action challenged as unconstitutional.

Though they are not strictly about standing, cases involving the ability to appeal as an aggrieved party are instructive because "aggrievement" for purposes of appeal necessarily carries with it the determination that the litigant "retains a stake in the appeal

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5. The possibility of a waiver is as irrelevant here as was the possibility of alternative relief in *Chadha*, 462 at 936-37. In *Chadha*, this Court held that

> [a] person threatened with deportation cannot be denied the right to challenge the constitutional validity of the process that led to his status merely on the basis of speculation over the availability of other forms of relief.

462 U.S. at 936-37. Appellants' effort to distinguish *Chadha* on the grounds that it involved "final" action is unavailing. Here, HHS has already determined that New York's provider taxes are unlawful; a waiver would not overturn that determination, but would simply provide relief from the threatened consequences of that determination — just as Mr. Chadha had potential avenues for relief from the threatened consequences facing him.

satisfying the requirements of Article III." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 334 (1980); *see also SCRAP*, 412 U.S. at 689 n.14 (" 'Injury in fact' reflects the statutory requirement that a person be 'adversely affected' or 'aggrieved' . . . ."). Appellees' situation is like that of a litigant who is awarded summary judgment, only to see the victory taken away on appeal with a direction for a trial. The once-victorious litigant might prevail again, but having achieved his desired result once, he is undoubtedly aggrieved by having to take his chances at trial and may appeal the determination that he do so. *See, e.g., Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 537 (1994).

As the district court correctly explained:

> [Appellees] had two independent avenues that they could have pursued to avoid potential liability: one legislative and one administrative. The legislative approach yielded complete success. The fact that there are two mechanisms that could produce a result does not mean that a party is not injured when one of those mechanisms produces the desired result and then that result is obliterated.

J.S. App. 13a-14a.

In short, the cancellation of section 4722(c) dramatically altered Appellees' legal status from being protected against loss to being once again exposed. This is injury in fact.[6] As to this injury, little need be said about the two other prongs of the test for standing. The direct cause is the cancellation of section 4722(c) pursuant to

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6. Appellants assert that Appellees must identify a concrete instance in which the cancellation caused them to alter their business practices, such as creating a cash reserve to cover their potential liability to New York. Br. for Applts. at 32 n.12. No such requirement exists. The injury flowing from the loss of legislative protection and the reimposition of the risk of financial loss is sufficient to establish standing, without the need to elicit "proof" of *additional* injury, *e.g.*, impairment of the ability "to engage in meaningful planning and borrowing of funds." J.A. 29.

the Line Item Veto Act, and a favorable decision here would redress the injury by restoring the cancelled legislative enactment.

b. The Likelihood that HHS Will Reduce New York's FFP Is Sufficient Risk of Injury to Confer Standing.

If this Court does not consider loss of the statutory protection provided by section 4722(c) to be injury in and of itself, it should find Appellees injured because the cancellation places them at substantial risk of losing millions of dollars because of HHS's threat to reduce FFP in New York's Medicaid Program. This loss need not be an absolute certainty to provide a basis for standing.

"A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). The function of this requirement is to ensure that the litigants are involved in an actual controversy and are not litigating an abstract or hypothetical dispute. *See id.*

At the very least, a "realistic danger" of injury confronts Appellees. Appellants' statements when section 4722(c) was cancelled make HHS's future course readily apparent: the waivers will almost certainly be denied. The President cancelled section 4722(c) as "new direct spending," 2 U.S.C. § 691(a)(2) (Supp. II 1996), and he certified, again as required by law, that the cancellation "will . . . reduce the Federal budget deficit." 2 U.S.C. § 691(a)(A) (Supp. II 1996); J.S. App. at 63a. In his explanation, the President said:

> The canceled item would have deemed taxes, fees, or assessments that were collected by the State of New York from a health care provider before June 1, 1997, and for which a waiver has been applied for, to be permissible health care related taxes in compliance with the requirements of Medicaid law. . . . This preferential treatment would have increased Medicaid costs. . . .
>
> * * *
>
> As a result of the cancellation, Federal outlays will not increase, as specified below.

J.S. App. at 64a. Attached to this message was a table with the Government's estimate, subject to revision, that the cancellation reduced federal outlays by $200 million. J.S. App. at 65a.

Appellants now claim that these statements about savings merely reflect the fact that, at the moment of cancellation, the President's action reduced government outlays, on paper, by eliminating the budget authority embodied in section 4722(c); however, Appellants say this assertion is not a harbinger of HHS's ultimate decision on the waiver applications. Br. for Applts. at 22-23 n.9. This reasoning ignores the second prong of the President's certification to Congress. It may explain how section 4722(c) qualifies as "new spending," thus making it subject to cancellation under the Line Item Veto Act, but if the cancellation was not going to lessen actual federal expenditures, the President could hardly comply with the statutory requirement that he assure Congress that his action "will" reduce the deficit. This assurance was possible only if the waiver applications will be denied, and Appellant Raines said at a post-cancellation press conference that New York "will not be able" to collect FFP from the provider taxes. J.A. 68.[7]

In numerous cases, this Court has found injury in fact based on a risk of future injury substantially less than Appellees face here. In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), landlords were held to have standing to challenge a provision in a rent control ordinance requiring reduced rents for tenants in financial distress.

7. Appellants incorrectly characterize as "in no way inconsistent with the future granting of waiver applications," Br. for Applts. at 22, a statement by HHS in an October 1997 letter to State Medicaid directors that, without new federal legislation, HHS would "move forward to complete the process already begun to apply with full force the current law." J.A. 93. The undisputed record shows that this letter was followed by HHS's explanation at meetings with New York officials that New York's waivers would not be resolved absent a global resolution of all states' waiver applications, which could be achieved only via legislation. *See* J.A. 106. The district court did not misread that part of the record in concluding that it reflected a likelihood "that the State of New York will be required to refund at least some of the payments it has received from [HHS]." J.S. App. 15a.

The appellees said the owners did not have standing because the prospect of injury was speculative, but this Court, citing *Babbitt*, ruled that "[t]he likelihood of enforcement, with the concomitant probability that a landlord's rent will be reduced . . . , is a sufficient threat of actual injury" to support standing. 485 U.S. at 8.

In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the issue was whether the plaintiffs had standing to argue that procedural due process requirements apply when private nursing homes decide that it is medically appropriate to transfer a patient to a lower level of care. The plaintiffs had been subjected to government-instigated transfers based on the medical judgment of review committees established to ensure that public health care funds were spent only for needed care, but there had been no threatened transfers by private nursing homes. *See* 457 U.S. at 999-1000. Standing was found because "the threat of facility-initiated discharges or transfers . . . is sufficiently substantial." *Id.* at 1000. The decision observed that the nursing homes were "free to determine" that transfer was appropriate, *id.*, and the threat of such a decision was considered "quite realistic" since "similar determinations" had already been made by the review committees, whose members were selected by the nursing homes. *Id.* at 1001.

In *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977), a housing developer was allowed to contest a denial of rezoning even though ultimate construction of its project was contingent on "secur[ing] financing, qualify[ing] for federal subsidies," and completing construction. *Id.* at 261. The opinion explained that "undue speculation" about the likelihood of construction was not warranted since there was "a detailed and specific" project at issue. *Id.*; *see also Air Courier Conference of Am. v. American Postal Workers Union*, 498 U.S. 517, 524 (1991) (accepting district court's finding of injury predicated on its determination that "increased competition . . . might have an adverse effect on employment opportunities of postal workers").

In cases like *Blum* and *Babbitt*, it was always possible that the ultimate injury-creating decisions would not be made, but a

plaintiff's burden is to show significant risk of injury, not metaphysical certainty. The risk here is comparable to the risk present in cases where this Court has found standing. This case is not like *Defenders of Wildlife*, where plaintiffs were found not to have standing when they claimed that areas they might want to visit at some unspecified future time were about to be environmentally damaged by wrongful government action. *See* 504 U.S. at 563-64. Nor is it like *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26 (1976), where indigent plaintiffs sought to challenge tax exemptions granted nonprofit hospitals on the "purely speculative" theory that the tax exemptions encouraged the hospitals to limit treatment of indigents. 426 U.S. at 42, 42-43.

Here, Appellees have presented far more than "unadorned speculation." *Id.* at 44. There is a long-standing dispute with HHS about New York's provider taxes. HHS has stated that the taxes do not meet federal standards and, like the doctors in *Blum*, it has tipped its hand regarding the waiver applications.[8]

Appellants turn standing principles on their head when they argue that the possibility of future waivers from HHS minimizes the threat posed by HHS's existing determination that the provider taxes do not comply with Medicaid requirements. To support this argument, Appellants rely heavily on *Anderson v. Green*, 513 U.S. 557 (1995), Br. for Applts. at 20-21, where this Court ruled that a challenge to a California statute capping the amount of public assistance benefits for new state residents was nonjusticiable because, by its terms, the statute would take effect only upon issuance of a

8. Appellants suggested below that HHS had not even made a "final agency decision" as to whether New York's disputed provider taxes violate Medicaid requirements, J.A. at 38, but they do not deny here that they consider the taxes improper. This implicit acknowledgment is understandable given HHS's 1994 letter identifying the taxes as violative of Medicaid standards, the President's reference to the taxes as "impermissible" in his cancellation message, J.S. App. at 64a, and the Budget Director's similar references at the post-cancellation White House press conference (*supra* pp. 4-5).

waiver by HHS, and at the time this Court ruled, a prior waiver had been annulled in another proceeding. *See* 513 U.S. at 559. Critical to that result was

> California['s] acknowledge[ment] that even if it prevails here, the [challenged policy] will not take effect. . . . The parties have no live dispute now, and whether one will arise in the future is conjectural.

Id. (citation omitted). *Anderson* is instructive because it shows that risk of injury should be assessed on the state of affairs in existence now, not at some hypothetical future point. Factually, *Anderson*'s situation is the opposite of the situation here. Resolution of this suit in a manner favorable to Appellees will make a difference by restoring section 4722(c) and eliminating the "realistic" danger that HHS will carry out its oft-repeated threat to withdraw FFP from New York's Medicaid program. *Babbitt*, 442 U.S. at 298.

In *Anderson*, the injury-creating party, California, was prevented from acting by a legal roadblock — the absence of HHS's approval — which might never be removed. Here, there was a legal roadblock protecting Appellees from injury — section 4722(c) — but it was cancelled pursuant to an unconstitutional statute, thus reimposing the threat that HHS will injure Appellees by withdrawing FFP.

The other cases Appellants cite on this issue are readily distinguishable. *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1666 (1997); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1019-20 (1984); and *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981), Br. for Applts. at 21, all stand for the unexceptionable proposition that "an as-applied [Takings] challenge [is] unripe" if the plaintiff has not utilized an available administrative or judicial process capable of supplying relief, whether by granting a variance from the law's requirements or providing just compensation for any taking. *Suitum*, 117 S. Ct. at 1666; *see Ruckelshaus*, 467 U.S. at 1013 & n.16. The instant case is a facial challenge based on the proposition that the Line Item Veto Act can never be constitutionally applied.

See Anderson v. Edwards, 514 U.S. 143, 155-56 n.6 (1995). Accordingly, the ripeness concerns expressed in *Suitum*, *Ruckelshaus*, and *Hodel* have no bearing here. *See Suitum*, 117 S. Ct. at 1666 n.10; *Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992). Indeed, in *Ruckelshaus* and *Hodel*, facial challenges were made, and this Court addressed those claims on their merits. *See Ruckelshaus*, 467 U.S. at 1014-16 (whether takings authorized by statute were for a public purpose); *Hodel*, 452 U.S. at 275-305 (whether statute was facially unconstitutional as violative of, *inter alia*, Commerce Clause, Tenth Amendment, and Takings Clause).[9]

Moreover, the ripeness concerns mentioned in *Thomas*, 473 U.S. 568, Br. for Applts. at 21, favor Appellees here. "The issue presented in this case is purely legal, and will not be clarified by further factual development," *id.* at 581, and "the public interest would be well served by a prompt resolution of the constitutionality" of the Line Item Veto Act. *Id.* at 582. Indeed, Congress enacted special judicial review provisions to insure this Court's speedy consideration of the issues raised by this lawsuit, *see* 2 U.S.C. § 692, thus eliminating any claim that prudential considerations of ripeness should lead the courts to defer consideration of the "important dispute" this case raises. *Raines*, 117 S. Ct. at 2318 & n.3; *id.* at 2323 n.1 (Souter, J., concurring).

2. Appellees' Injury Is Fairly Traceable to the President's Use of the Line Item Veto Act and Would Be Redressed by a Favorable Decision in this Case.

Appellees' standing is not undercut by the fact that their financial loss upon reduction of FFP flows from New York statutes. Appellants do not dispute that state law imposes automatic liability on health care providers if HHS recoups FFP because of the provider taxes. Rather, they contend that, since Appellees' loss is not commanded by Federal Medicaid laws, Appellees' injury is not attributable for standing purposes to the President's cancellation of section 4722(c). Br. for Applts. at 23-25.

9. No facial challenge was made in *Suitum*. *See* 117 S. Ct. at 1666 n.10.

This argument "wrongly equates injury 'fairly traceable' to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear*, 117 S. Ct. 1154, 1164 (1997). "[C]ollateral consequences" of challenged action satisfy causation requirements for standing so long as their occurrence is not unduly speculative. *Spencer v. Kemna*, 118 S. Ct. 978, 985 (1998).

In cases where the injured plaintiff is not the party directly acted upon by the challenged government action, legally cognizable injury depends on the directly affected party's "response," so the plaintiff must "adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562.[10] Here, the injury-producing choices "have been" made; New York's statutes make Appellees liable for millions of dollars if HHS reduces New York's FFP because of the provider taxes.

In *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978), this Court upheld the plaintiff's standing to challenge legislation limiting liability for accidents at nuclear power plants because the district court "discerned a 'but for' causal connection" between the enactment and the construction of additional nuclear power plants. 438 U.S. at 74; *see id.* at 77-78. That same connection is present here.

In *Barlow v. Collins*, 397 U.S. 159 (1970), tenant farmers were allowed to attack an amendment to Department of Agriculture regulations allowing assignment of certain farm subsidy payments to pay rent for the land. The plaintiffs claimed the regulation injured them indirectly because it afforded landowners increased bargaining leverage, allowing the owners to insist on the assignment, depriving the tenants of cash and increasing their dependence on the owners. *See* 397 U.S. at 160-63.[11]

10. Little need be said on the subject of redressability. A ruling that the Line Item Veto Act is unconstitutional and that section 4722(c) is a valid law will eliminate the injury caused by its cancellation, and no party contends otherwise.

11. This Court likewise held that an indirect causal chain supported (Cont'd)

In *Maryland v. Louisiana*, 451 U.S. 725 (1981), Maryland and other states challenged a tax that Louisiana levied on natural gas pipeline companies, a tax the companies "theoretically" could have absorbed themselves. Report of the Special Master 11 (Sept. 15, 1980), *Maryland v. Louisiana*. However, the pipeline companies sought and received approval from the Federal Energy Regulatory Commission to pass the tax on to consumers. *See* 451 U.S. at 737. Maryland claimed injury as a gas consumer, and Louisiana argued that Maryland lacked standing because it was not the party directly liable for the tax. This Court disagreed, finding that the costs borne by the consumers because of the pass-along were causally connected to the challenged tax. 451 U.S. at 736-37; *see also General Motors Corp. v. Tracy*, 117 S. Ct. 811, 818 (1997) (allowing natural gas consumer's Commerce Clause challenge to a tax imposed on certain sellers of natural gas).

Appellants support their causation argument by relying on *Warth*, 422 U.S. 490, Br. for Applts. at 24, but the facts in *Warth* bear little relation to those here. In *Warth*, various plaintiffs complained that Penfield, New York used exclusionary zoning to keep "persons of low and moderate income from living in the town." 422 U.S. at 493. This Court found that the plaintiffs had not shown a causal relationship between the challenged zoning and the plaintiffs' inability to live in Penfield because the plaintiffs

> rel[ied] on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief.

(Cont'd)
standing in *Bryant v. Yellen*, 447 U.S. 352, 366-68 (1980). There, would-be farm purchasers had standing to seek declaratory relief challenging the Government's interpretation of reclamation laws that allegedly reduced the likelihood *third parties* would make land available for purchase at below market prices. This indirect, and probabilistic, traceability was enough to meet the requirements of Article III — "even though [the would-be purchasers] could not with certainty establish that they would be able to purchase excess lands" if declaratory relief were granted. *Id.* at 367.

Id. at 507. Here, speculation is not needed to divine the consequences that will befall Appellees if FFP is withdrawn from New York; the consequences have been enacted into law.[12]

Appellants invite improper speculation when they note that New York has "discretion regarding the appropriate response" if FFP is withdrawn. Br. for Applts. at 23 n.10. The point is of no moment because New York has already acted, adopting laws imposing substantial financial obligations on Appellees. If Appellants' point is that the state's laws are changeable, they are asking this Court to indulge in the very kind of speculation it has repeatedly eschewed. *Cf. Duke Power*, 438 U.S. at 77-78 (commenting on the defendants' argument that, if the challenged statute had not been passed, Congress would have taken other action leading to the same injury — "[n]othing in our prior cases requires a party seeking to invoke federal jurisdiction to negate the kind of speculative and hypothetical possibilities suggested in order to demonstrate the likely effectiveness of judicial relief," *id.* at 78); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974)

12. The two court of appeals cases emphasized by Appellants do not aid their argument. *See* Br. for Applts. at 25 n.11. In *Young v. Klutznick*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982), the alleged injury— malapportionment of the Michigan Legislature because of faulty census data — had not occurred, and would not, absent a discretionary decision by the Legislature to use the data without adjusting it. 652 F.2d at 623-24. Here, the consequence to the providers if New York loses FFP has been a matter of state law for years, and there is no need to speculate that "the . . . legislature will act in a particular way." *Id.* at 623. The ruling in *City of Detroit v. Franklin*, 4 F.3d 1367 (6th Cir. 1992), *cert. denied*, 510 U.S. 1176 (1994), that the discretionary decision to use the census data broke the chain of causation, is inapposite because it flows from the fact that the census data could have been adjusted before it was used. 4 F.3d at 1373. In this case, the challenged action — cancellation of section 4722(c) — is a "but for" cause of Appellees' injury. This kind of "but for" relationship was present in *Franklin* on another issue, not discussed by Appellants, and on that point, the court ruled that loss of federal funding was fairly traceable to the challenged census data since existing laws used that data to apportion federal aid for a host of programs. *Id.* at 1374.

(finding sufficient risk of future injury for suit to be ripe — "we must assume there will be compliance with" current law).

Instead of guessing what New York might do, the determination of causation should be based on what New York has done. The legal consequences that would automatically flow from a reduction in New York's FFP mean that the injury caused by the President's cancellation of section 4722(c) — a "but for" cause — is fairly traceable to that cancellation for standing purposes.

Appellees turn now to explaining why the Line Item Veto Act and the President's use of it to cancel section 4722(c) violate the Constitution.

II. THE LINE ITEM VETO ACT IS UNCONSTITUTIONAL AND THE PRESIDENT'S CANCELLATION OF SECTION 4722(c) OF THE BALANCED BUDGET ACT IS VOID.

The Constitution separates the power to make law from the power and duty to execute the law. Article I vests "[a]ll legislative powers" in the Congress. U.S. Const. art. I, § 1. The President's constitutional role is to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 3. The President has only a qualified check on the lawmaking process: he is empowered under Article I to "return" (veto) a whole bill that has been presented to him, but his veto may be overridden by two-thirds of both Houses of Congress. U.S. Const. art. I, § 7, cl. 2. This separation of legislative and executive power is one of the central foundations of our government. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952); *Buckley v. Valeo*, 424 U.S. 1, 129 (1976); *Chadha*, 462 U.S. 919; *Bowsher v. Synar*, 478 U.S. 714 (1986).

The core requirements of Article I's "single, finely wrought and exhaustively considered procedure" for the passage of legislation are bicameral passage and presentment to the President. *Chadha*, 462 U.S. at 951. The Act plainly confers upon the President the unilateral power to make law (or, more precisely, to *unmake* law) in violation of the bicameral passage and presentment requirements of Article I.

A. Article I Prescribes the Exclusive Means for Enacting and Repealing Federal Law.

Article I requires, first, that any bill making or changing federal statutory law must be passed by both Houses of Congress in exactly the same form. The Framers "provided[ed] that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses . . . ." *Id.* at 948. Thus, unlike the President, each House of Congress has an unqualified power to block a bill from becoming law.

The "Presentment Clause," Article I, Section 7, Clause 2, requires that every bill passed by both Houses be presented to the President, and it gives him only three choices: he may sign the bill into law, he may return it with his objections, or he may do nothing with it for ten days, after which it becomes law (unless the pocket veto clause applies).[13] As noted earlier, the President has only a qualified blocking power, for his veto may be overridden.[14] The

13. The Presentment Clause, in pertinent part, provides as follows:

> Every Bill which shall have passed the House of Representatives and the Senate shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall . . . proceed to reconsider it. If after such Reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law. . . . If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

14. The Constitution does not give the President any "legislative Powers" but only "a salutary check upon the legislative body" after both Houses have passed a bill. The Federalist No. 73 (Alexander Hamilton).

language of the Presentment Clause makes clear that the President must either approve the bill or return it in its entirety, exactly as it is presented to him.[15] The *in toto* requirement ensures that the President, like the House and Senate, lacks power to unilaterally revise the work of the other participants in the lawmaking process.

Appellants readily acknowledge that under the Presentment Clause, "the President is required to sign or return a presented bill *in toto;* he is not empowered to sign some portions of the bill and return others." Br. for Applts. at 34. The sole purpose of the Act, as its title frankly proclaims, is to evade this constitutional constraint, and Appellants have previously admitted that the "practical effect" of the Act's sign-and-then-cancel procedure is the same as a "true item veto." Br. for Applts. at 36 in *Raines v. Byrd*, No. 96-1671. The parties to this case thus agree that the Act was deliberately designed by Congress to accomplish two objectives: to comply with the procedural formalities of Article I, and to defeat the very purpose of those formalities. Appellees in the companion *Snake River* case, noting that the Constitution condemns " 'indirect attempt[s] to accomplish what the Constitution prohibits [Congress] from accomplishing directly,' " Br. for Appellees *Snake River* at

15. The requirement that the President sign or veto a presented bill *in toto* has been clear since the beginning of the Republic: "From the nature of the Constitution, I must approve all the parts of a Bill, or reject it in toto." 33 *Writings of George Washington* 96 (John C. Fitzpatrick ed. 1940). Eighteenth century explanations of the Presentment Clause are consistent with Washington's view. *See generally* 12 Op. Off. Legal Counsel 128 (1988). Later Presidents have understood that they could not approve or disapprove only parts of a bill. *Id.* at 157-65 (describing the view of Presidents Washington, Grant, Hays, Taft, Wilson, Ford and Reagan that they were required to sign or return multiple-item bills *in toto*, even though they approved of some items and disapproved of others). Thus, from the time of the Framers, there has been almost universal agreement that the President cannot sign some parts of a bill into law while rejecting other parts. *See generally Line Item Veto: The President's Constitutional Authority, Hearing on S. Res. 195 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 103rd Cong. (1994).

35-36, (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995)), argue that the Act unconstitutionally infringes the *in toto* requirement of the Presentment Clause, and we will not repeat their points here. For even if the requirements of the Presentment Clause, as Appellants argue, are strictly procedural and can be satisfied by a clever contrivance openly designed to evade them, the cancellation power conferred on the President under the Act nonetheless violates the requirements of Article I.

B. The Line Item Veto Act Unconstitutionally Confers upon the President an Article I Power to Repeal Duly Enacted Federal Laws at His Discretion.

Appellants concede that "[w]hen the President signs a tax or spending bill, '[the] bill when so signed becomes from that moment a law.' " Br. for Applts. at 34, quoting *La Abra Silver Mining Co. v. United States*, 175 U.S. 423, 454 (1899). And when the President cancels a tax or spending provision under the Act, it ceases from that moment to be a law. Once an item is canceled under the Act, it is *extinguished.* The term "cancel" is defined under the Act to mean "rescind," with respect to an item of discretionary budget authority, and "prevent . . . from having legal force or effect," with respect to an item of new direct spending and a limited tax benefit.[16] 2 U.S.C. § 691e(4). A presidential cancellation operates on the provision of law itself,[17] permanently removing it from the body of operative federal statutes.[18] Neither the President who canceled

16. The dictionary definition of the verb "repeal" is "1: to rescind or revoke (as a sentence of law) from operation or effect." *Byrd v. Raines*, 956 F. Supp. 25, 37 n.13 (D.D.C. 1997).

17. The Act specifies that a presidential cancellation "rescind[s]" the "budget authority" itself, and "prevent[s] . . . from having legal force or effect" the "specific provision of law" or the "specific legal obligation" authorizing the spending or limited tax benefit. 2 U.S.C. § 691e(4).

18. The Conference Report makes clear that "cancellation" permanently alters the rights of individuals, states, government contractors, and others with an interest in canceled items. H.R. Conf. (Cont'd)

the provision nor any successor President can exercise the authority that the provision, before its cancellation, had granted. It can be restored to the status of law only if it is reenacted according to the procedure prescribed by Article I.[19] In short, the power to "cancel" a duly enacted spending or tax code provision is the power to *repeal* the provision, plain and simple.[20]

The President's cancellation in this case illustrates the true nature of this power. In passing section 4722(c), Congress made a decision that New York State's health-care taxes qualify for federal matching funds. That decision became law when the President

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Rep. No. 104-491, at 29 (1996) (in different contexts cancellation negates the government's "legal obligation to pay a benefit," "eliminat[es] the increase in food stamp obligations that otherwise would occur," and "foreclose[s] the ability of the Federal Government to enter into an agreement to pay the amount of money provided in the law").

19. The Act provides an expedited procedure for congressional consideration and enactment of so-called "disapproval bills." A disapproval bill, however, must go through the full constitutional process of enactment, including bicameral passage and presentment to the President, although its consideration is expedited. *See* 2 U.S.C. § 691e(6).

20. The House-passed version of the Act, H.R. 2, used the terms "veto" and "repeal," and the related committee report confirmed that repeal was intended:

> Any provision of law, as set forth in the President's special message, shall be deemed *repealed* unless a rescission/ receipts disapproval bill restoring that provision is enacted into law.

See H.R. Rep. No. 104-11, pt. II, at 14 (1995) (emphasis added). The distinction between a temporary suspension (deferral) and a permanent repeal (rescission) was an essential element of the Impoundment Control Act as enacted in 1974. Although Congress changed the word to "cancel," it rejected the Administration's urgings to change the power given to the President to one of suspension only. *See* H.R. Conf. Rep. No. 104-491, at 20 (1996).

signed the Balanced Budget Act. The President disagreed with Congress' judgment and thus reversed its determination by exercising his power of cancellation. After the President's veto, section 4722 is gone; it has no legal force or effect. And neither the President nor Congress can bring it back without enacting new legislation. Quite simply, this measure has been repealed.

In *Chadha*, this Court held that the power to make law can be exercised only in accordance with the bicameral passage and presentment requirements of Article I.[21] *See also Metropolitan Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 n.19 (1991) ("[W]hen Congress legislates, when it makes binding policy, it must follow the procedures prescribed in Article I.") (quoting *Bowsher*, 478 U.S. at 757-59 (opinion of Stevens, J.)). And the *Chadha* Court made clear that "repeal of statutes, no less than enactment, must conform with Art. I." 462 U.S. at 954. There is simply no doubt whatsoever, therefore, that Article I would prohibit a statute reserving to Congress a unilateral cancellation power identical to that conferred upon the President under the Act. It follows that the President's cancellation power under the Act is unconstitutional and that his specific cancellation, his repeal, of section 4722(c) is void.

At the center of Appellants' constitutional defense of the Act is their contention that the President's cancellation power is not a unilateral power of repeal, but rather

> is, in practical effect, no more and no less than the power to "decline to spend" specified sums of money, or to "decline to implement" specified tax measures.

Br. for Applts. at 40. The Act, Appellants say, merely establishes a new "default rule" for spending and tax measures, granting the President general discretionary authority that is materially

21. 462 U.S. at 957. The legislative action at issue there was the effective repeal, through exercise of the one-House veto, of the statutory delegation of authority under which the Attorney General permitted Mr. Chadha to remain in the country.

indistinguishable from the specific discretionary authority granted to the President in "lump sum" appropriations measures, which have been enacted routinely by Congress since the days of President Washington. Appellants dismiss the Act's inconvenient (for their argument) use of the term "cancel" and its statutory definition ("rescind" and "prevent . . . from having legal force or effect") as "infelicitous terminology [that] cannot transform the cancellation into an unconstitutional amendment or repeal of an enacted law." Br. for Applts. at 40-41. In this regard, Appellants rely heavily upon this Court's decisions in cases, such as *Field v. Clark*, 143 U.S. 649 (1892), and *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928), which discussed approvingly statutory provisions granting the President discretion, Appellants say, to declare certain tariff acts and similar measures "repealed," "inoperative," and "of no effect." Br. for Applts. at 40. In truth, however, the statutes at issue in these and similar cases were upheld by this Court precisely because they did *not* vest the President with *discretion* to repeal or otherwise extinguish federal laws.

At issue in *Field* was a section of the Tariff Act of 1890 directing the President to "suspend" certain provisions of the Act permitting tariff-free importation of foreign agricultural products if the President determined that foreign governments were imposing "reciprocally unequal and unreasonable" tariffs on similar American products. *See* 143 U.S. at 680. This Court rejected the claim that the President's suspension power violated the "universally recognized" and "vital" principle that "congress cannot delegate legislative power to the president," emphasizing that "[h]e had *no discretion* in the premises . . . ." *Id.* at 692-93 (emphasis added).[22] "Nothing involving the expediency or the just operation of such legislation was left to the determination of the president." *Id.* at 693. To the contrary, when the President ascertained the fact that reciprocally unequal and unreasonable duties were imposed by

22. The *Field* Court noted that the only discretion vested in the President under the 1890 Tariff Act concerned "the duration of the suspension so ordered. But that related only to the enforcement of the policy established by congress." 143 U.S. at 693.

foreign governments on American products, "it became his duty to issue a proclamation declaring the suspension, as to that country, which congress had determined should occur." *Id.* The Court left no doubt that in suspending the operation of the Tariff Act, the President was executing the will of Congress rather than his own:

> As the suspension was absolutely required when the president ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, . . . in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the act of congress.

Id.

As Appellants note, the *Field* Court cited earlier statutes authorizing the President (1) "to declare the repeal" of certain tariff provisions upon finding that discriminatory duties of foreign nations had been abolished; and (2) "to declare . . . inoperative" certain import restrictions upon a finding that the imported goods posed no threat of contagious diseases. But both of the referenced statutes fall well within the reasoning of the Court in *Field*, for they obliged the President to declare the repeal only upon his finding of a named contingency.

In *J.W. Hampton, Jr. Co. v. United States*, 276 U.S. 394 (1928), the Court extended this reasoning to a tariff statute requiring the President to "modify or terminate" import duties in accordance with his determinations concerning differences in the cost of production between similar domestic and foreign products. Relying specifically on *Field*, the Court held that the President's power to terminate the statutory tariff was not legislative in nature, for "[h]e was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect." *Id.* at 411. Congress, therefore, had performed the legislative function of determining whether a specific statutory provision would be removed from the body of operative federal law; the

President merely implemented Congress' decision by calling upon his uniquely executive capacities to investigate and to ascertain whether the contingency prescribed by Congress had been satisfied.[23]

The statutes upheld in *Field* and *J.W. Hampton* are thus materially indistinguishable from legislation containing a standard sunset provision prescribing a date certain for its own expiration. In executing such a provision the President's role is the same — he must ascertain whether the contingency prescribed by Congress has occurred, although he need only consult a calendar to do so. On the prescribed sunset date, the President must declare the legislation expired; he has no discretion to continue enforcing it. No one would seriously contend that such a sunset provision vests a unilateral power of repeal in the President, and the provisions upheld in *Field* and *J.W. Hampton* differed only in that the President was required to exercise a more subjective judgment in ascertaining the existence of the prescribed conditions. Still, he is duty-bound to exercise his judgment in good faith, as the *Field* Court made clear.[24]

The Line Item Veto Act, in stark contrast, confers upon the President *discretion* to decide whether certain duly enacted spending and tax laws will continue to exist, or cease to exist. There can be

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23. Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an executive. . . .

J.W. Hampton, 276 U.S. at 407.

24. The Tariff Act of 1890 required the President to suspend duty-free importation of foreign products whenever American products were subjected to tariffs that "he may deem to be reciprocally unequal and unreasonable." 143 U.S. at 698. The Court rejected the notion that the words "he may deem" vested the President with discretion. Rather, the President was duty-bound under the Act to investigate foreign tariff regulations and to "form a judgment as to whether they were reciprocally equal and reasonable." *Id.* at 692.

no serious doubt that in making his decision, the President is guided by no standard other than whether he favors the item; he exercises his cancellation power *at his pleasure*, implementing his own will rather than that of Congress. The Act , after all, was designed for the sole purpose of granting the President the functional equivalent of a true line-item veto. By contrast, under the statutes upheld in *Field*, *J.W. Hampton*, and similar cases, the President merely carried out the instructions of Congress concerning the conditions under which certain provisions would cease to exist.

Appellants respond to this point with two arguments, neither of which has merit. First, noting that Congress was fully aware of the "possibility that individual items [of the Balanced Budget Act] would be canceled . . . at the moment of their passage," Appellants contend that the cancellations at issue here reflect, rather than subvert, the will of Congress. Br. for Applts. at 39. It is certainly true that when Congress enacted the Line Item Veto Act, it expected the President to use it. But that fact simply does not address the question whether the power granted to the President under the Act is constitutional. Indeed, Appellants' argument could be used to justify a statute granting the President unilateral power to entirely rewrite, rather than simply to cancel, recently enacted federal laws. More fundamentally, Appellants are simply wrong. Section 4722(c) was enacted by Congress as part of the Balanced Budget Act, was presented to the President, and was signed into law. The will of Congress was reflected in section 4722(c). As the district court below observed, the Balanced Budget Act that "resulted after the President's line item veto [of Section 4722(c) was] different from [the law] consented to by both Houses of Congress." J.S. App. 24a. And the Balanced Budget Act *without* section 4722(c) reflected only the will of the President. Appellants' argument to the contrary is specious.

Secondly, Appellants attempt to establish that the President's cancellation power is guided and limited by "meaningful constraints" under the Act. Br. for Applts. at 46. It plainly is not. The requirements that the President cancel an item within five days after signing a bill, and that he cancel only whole items, simply

reflect the intention to give him an item veto in the legislative process; they do not give him significant guidance on how much to cancel or which programs to eliminate. That the President, by virtue of the Act's "lock box" feature, has no authority to divert canceled funds for other purposes merely reflects that he has been granted a unilateral power of repeal rather than of revision. The requirement that he "consider the legislative history, construction, and purposes of the law which contains the" canceled items, as well as "any specific sources of information referenced in such law," appears to relate only to the identification of what is an "item" and in any event does not meaningfully constrain his discretion. That the President must articulate his reasons for canceling an item only mirrors the constitutional requirement that he include "his Objections" when he "returns" a bill. U.S. Const., art. I., § 7, cl. 2. It certainly does not constrain what those reasons may be.

Appellants also point to the provision of the Act requiring the President to determine that his cancellation of a spending item or limited tax benefit will "(i) reduce the federal budget deficit; (ii) not impair any essential Government functions; and (iii) not harm the national interest." 2 U.S.C. § 691e(a)(A). While these provisions may be "intelligible," they are hardly constraints on the President's cancellation discretion. The first requirement is a tautology; if the government's spending is reduced, its deficit will be reduced. And the other two criteria may be taken as givens. Telling the President that he may not use his cancellation power to knowingly and gratuitously harm the national interest or impair an essential government function simply does not serve to limit the options otherwise available to him.[25] Certainly these criteria would not provide a basis for judicial review of a Presidential cancellation under the Act.[26]

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25. Appellants note that certain items of "direct spending" are not subject to the President's cancellation authority. Br. for Applts. at 47. Appellants do not explain how this fact operates to constrain the President's discretion with respect to items that are within his cancellation authority.

26. "Executive action is always subject to check by the terms of (Cont'd)

Given that the sole purpose of the Line Item Veto Act was to replicate the President's constitutional veto power, it would be strange indeed if the Act placed serious constraints on the President's cancellation discretion. It does not. Rather, it grants the President the purely legislative authority to repeal certain spending and revenue measures, bounded only by his own view of which previously legislated programs should continue to exist. And if Congress disagrees with his cancellations, it has the "onus" of passing new laws to overturn the President's policy decisions.[27]

C. The President's Cancellation Power Under the Act is Not a Delegation of Article II Discretionary Authority over Spending.

Throughout their opening brief, Appellants liken the President's cancellation authority under the Act to his discretion under so-called "lump-sum" or "sums not exceeding" appropriations measures, which typically accord to the President discretion concerning how much (if any) of the appropriated funds to spend on particular programs. Noting that the general operations of the government during the Washington Administration were funded through lump-sum appropriations acts, Appellants note that

> [t]he Members of the First Congress evidently saw no constitutional impediment to vesting the

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the legislation that authorized it; and if that authority is exceeded it is open to judicial review." *Chadha*, 462 U.S. at 953 n.16. The Act makes no serious pretense of providing any such judicially enforceable "check" precisely because it confers upon the President a discretionary lawmaking power.

27. The Conference Report for the Act candidly states:

> The purpose of the [Act] is to promote savings by placing the onus on Congress to overturn the President's cancellations of spending and limited tax benefits.

H.R. Conf. Rep. No. 104-491, at 16 (1996).

> Executive Branch with broad discretion over the disposition of appropriated funds.

Br. for Applts. at 44.

Nor do we. But the dispositive distinction between a lump-sum appropriations statute and the Line Item Veto Act is that the former grants the President discretion, perhaps sweeping and unbounded, in the *implementation* of the spending measure, while the Line Item Veto Act grants the President discretion, sweeping and unbounded, to *extinguish* the spending measure. Surely Appellants can grasp the difference between a statute that says this,

> For Fiscal Year 1998 the President is authorized to spend, at his pleasure and without restriction, a sum not exceeding [fill in blank] dollars on the programs and operations of the Department of [fill in blank],

and one that says this,

> For Fiscal Year 1998 the President is authorized to repeal, at his pleasure and without restriction, any provision of this Act authorizing expenditures for the programs and operations of the Department of [fill in blank].

The spending discretion granted under a lump-sum appropriation statute can be exercised by the President at any time during the appropriation period, and an exercise of the granted discretion does not disturb, let alone extinguish, the underlying appropriation law. If the President decides not to spend some or all of the appropriated funds, the authority to spend the funds — that is, the law itself — remains in place until it expires in accord with the terms of the statute. The President (or his successor) retains discretion throughout the appropriation period to reverse a prior decision not to spend in light of new information, further experience, or reordered priorities. Not until the appropriation law expires, or is repealed in accord with Article I, is the President's spending discretion extinguished. In short, discretion over spending operates on the funds, not on the law authorizing it.

In contrast, the President's cancellation discretion under the Act operates directly on the law authorizing the spending, rescinding it or rendering it of no legal force or effect. A cancellation strikes the spending or tax provision itself, permanently. And if the President (or his successor) subsequently changes his mind about the wisdom of a canceled item, such as section 4722(c), he is powerless to revive it, for his cancellation extinguished the law itself.

Appellants suggest that the permanent and irrevocable nature of a cancellation under the Act poses a lesser threat to the separation of powers than does a revocable exercise of spending discretion under a typical lump-sum appropriation measure. They argue that

> the discretion conferred on the President by the Act is plainly *narrower* than would be the case if the President were authorized to revisit the question whether particular expenditures should be made.

Br. for Applts. at 41. But the constitutional difficulty presented by the President's power to cancel spending and revenue laws has less to do with the *breadth* of the discretion granted under the Act than with the *kind* of discretion granted under the Act. The irrevocable nature of a cancellation simply demonstrates that the discretion vested in the President under the Act is not an Article II discretion to execute spending and revenue measures in accordance with his judgment, but rather is an Article I discretion to extinguish spending and revenue measures in accordance with his judgment.[28]

28. Appellants note that Executive Branch officials are often required to make irrevocable decisions within limited periods of time, such as the decision to initiate a suit or to file a notice of appeal within the time set by statute. Br. for Applts. at 41. That a President, like everyone else, must abide by jurisdictional time limits governing litigation in federal courts simply does not speak to the question whether Congress may grant the President the Article I power to repeal, at his pleasure, a duly enacted federal law. The answer to this question, we submit, does not change depending upon the amount of time that the President is given to exercise his cancellation power. If the Act's five-

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Appellants have cited no case, and we have found none, upholding a congressional delegation to the President of discretionary authority to repeal federal statutory law. The delegation cases upon which Appellants rely fall largely into two lines. One line of cases involves delegations to the President and administrative agencies of quasi-legislative authority to "fill up the details" in general statutory provisions. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825). By far the more numerous,[29] these cases require

> that Congress lay down the general policy and standards that animate the law, leaving the agency to refine those standards, "fill in the blanks," or apply the standards to particular cases.

Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring). The cases usually involve statutory delegations that call upon the President's uniquely executive capacities to gather facts, marshal special expertise, and move with relative dispatch.[30] In some cases, the gaps to be filled

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day cancellation provision is constitutional, so also would be a cancellation provision giving the President a five-month, five-year, or unlimited period in which to exercise his power.

29. *See, e.g., Loving v. United States*, 517 U.S. 748 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta v. United States*, 488 U.S. 361 (1989); *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976); *Lichter v. United States*, 334 U.S. 742 (1948); *American Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Yakus v. United States*, 321 U.S. 414 (1944); *NBC v. United States*, 319 U.S. 190 (1943); *New York Central Secs. Corp. v. United States*, 287 U.S. 12 (1932).

30. *See, e.g., Touby, supra* (Attorney General temporarily scheduled controlled substances on specified factual finding); *Lichter, supra* (in wartime, administrative officials renegotiated defense contracts on finding that profits were excessive); *Yakus, supra* (in wartime, Executive set price-ceilings after making a series of highly (Cont'd)

are wide and the delegated discretion is correspondingly broad. *See, e.g., NBC v. United States*, 319 U.S. 190, 215-16 (1943) (authorizing FCC to regulate broadcast licensing in accord with "public interest, convenience, or necessity"); *Yakus v. United States*, 321 U.S. 414, 426-27 (1944) (authorizing Executive in wartime to set "generally . . . fair and equitable" price ceilings that will "effectuate the purposes" of the law). The exercise of such delegated authority must be statutorily guided by "an intelligible principle," *Mistretta v. United States*, 488 U.S. 361, 372 (1989), and "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review . . . ." *Chadha*, 462 U.S. at 953 n.16. But, again, while Congress may delegate to the President sweeping discretionary authority to implement federal law, Congress may not delegate any authority to extinguish it.

The other line of delegation cases is exemplified by *Field* and *J.W. Hampton*, discussed in detail above. In these cases, as the district court in *Raines* explained succinctly,

> the Supreme Court recognized the practice of "legislating in the contingency," that is, where Congress itself determines in advance when conditions yet to occur should cause the law to cease to be operative. The President is merely the instrument of its will.

Byrd v. Raines, 956 F. Supp. at 37. As previously demonstrated, in canceling a duly enacted spending or revenue provision, the President exercises his own will, not Congress'. Appellants conclude their opening brief by noting that the district court found the President's power to cancel limited tax benefits "especially problematic." Appellants argue that this power "is also a form of discretionary administrative authority," Br. of Applts. at 47-48, but do not deny that cancellation of a limited tax benefit, which

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factual determinations); *Hope Natural Gas v. Federal Power Comm'n*, 196 F.2d 803 (4th Cir. 1952) (agency may set power rates after fact-finding).

nullifies a statutory provision entitling its beneficiaries to keep their own money, is not analogous to cancellation of an item of federal spending authority. Cancellation of a tax benefit simply cannot be reasonably characterized as a failure to spend federal funds, and thus cannot be likened to an exercise of discretion not to spend under a lump sum appropriation.

Here, cancellation of section 4722(c), which established as a matter of law that the disputed federal matching funds belong to New York, is precisely analogous to cancellation of a limited tax benefit, rather than an item of spending authority. Moreover, it is clear, contrary to Appellants' claim, Br. of Applts. at 48 n.28, that the Act's cancellation powers are not severable and that invalidation of the Act's provisions regarding limited tax benefits (or spending authorities) would require invalidation of the entire Act, as the brief of amici Reps. Skaggs, *et al.* makes clear.

In sum, however broad the Congressional power to delegate quasi-legislative authority to the Executive may be, it does not extend so far as to support the Line Item Veto Act.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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